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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974
NO. 74-969

OLYMPIC FASTENING SYSTEMS, INC., Petitioner,
v.
TEXTRON INC., Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No valid reason exists for the granting of the requested writ. The holding sought to be reviewed is not in conflict with the decisions of this Court. It is not in conflict with the law applied in other Circuits. Nor does it involve an issue of public importance.

This is a conventional patent suit in which the patent in suit has been held valid and infringed. The District Court held the patent in suit valid and this holding was not contested on appeal. Both the District Court and the Court of Appeals rejected two grounds for noninfringement advanced by petitioner. The District Court did find the patent not infringed on a third ground advanced by petitioner; however, the Court of Appeals for the Sixth Circuit held this finding to be clearly erroneous and reversed the District Court directing entry of a finding of infringement. Petitioner now seeks a retrial of the facts.

QUESTIONS PRESENTED.

The questions presented by petitioner are not raised by the record. The Court below neither disregarded narrowing limitations added to the claims to secure allowance over prior art nor broadened the claims to cover that which had been eliminated by limitation as suggested by Question 1. Neither Question 2 nor Question 3 was presented to the Courts below until the petition for rehearing in the Court of Appeals. They are not supported by the record. They represent an attempt by petitioner to induce this Court to review fact findings made in the lower courts under the guise of nonexistent questions.

The sole question which can properly be presented on this record is "Did the Court of Appeals correctly find that the petitioner's rivet, which admittedly utilizes the inventive step of the patent in suit and functions in the manner taught by the patent in suit and not like the prior art rivets, is within the scope of claims of the patent in suit?"

STATEMENT OF THE CASE.

Petitioner's "Statement of the Case" is incomplete, inaccurate, and highly argumentative.

The Gapp patent was issued to respondent April 5, 1960, covering a self-plugging blind rivet having the ability to clamp or clinch together workpieces being joined which are initially separated by some distance. The Gapp rivet was the first 'self-plugging' fastener to achieve satisfactory clinching (App. B, p. 22a). The Gapp rivet achieves this result by providing a blind head which will first upset the rivet tail, clinching the workpieces together, and thereafter fill the hole in the tubular portion of the rivet body. The prior art rivets which functioned in just the opposite manner, i.e., hole fill followed by tail upset, could not obtain this result. The Gapp rivet filled a long-felt need in the aerospace industry (App. A, pp. 11a-12a; App. B, pp. 22a-23a).

Petitioner took a license from respondent under the Gapp patent. Subsequently, petitioner refused to pay the required royalties on the Olympic-Lok rivet which it manufactures and sells, and brought this declaratory judgment action seeking an order that it was not required to pay royalties on the Olympic-Lok rivet. It argued that the Gapp patent was invalid and the Olympic-Lok rivet was not within the scope of the claims. The District Court held that the patent was valid and this holding was not questioned on appeal.

On the infringement issue, petitioner asserted three reasons why the Olympic-Lok rivet was not within the scope of the Gapp claims. It argued that in the Olympic-Lok rivet (1) the blind head was not of *substantially* uniform diameter, (2) the rivet tail was not completely

expanded in a single head forming operation to the finished size of the *clinching* tail and (3) the blind head was not pulled "through" the tubular rivet. Both of the Courts below held that the Olympic-Lok rivet functioned in the manner taught by the Gapp patent to obtain the result taught by the Gapp patent. Both of the Courts below found that the Olympic-Lok rivet did *not* function as the prior art rivets functioned.

With respect to the specific arguments advanced by petitioner both Courts below held that the blind head was of "substantially" uniform diameter. Both Courts also held that the Olympic-Lok rivet responded to the claim language that the rivet tail be completely expanded in a single head forming operation to the finished size of the clinching tail, the District Court holding it was at least an equivalent and the Court of Appeals approving that finding (App. A, p. 17a; App. B, p. 40a). Both Courts expressly found that any expansion after formation of the clinching tail "serves absolutely no purpose" (App. A, p. 17a; App. B, p. 40a). With respect to the third argument the District Court held that the blind head of the Olympic-Lok rivet was not pulled "through" the tubular rivet because it was not pulled out of the tubular rivet. The Court of Appeals reversed on this point. After reviewing the specification, claims, and file history it held that the word "through" did not require the blind head to be pulled out of the tubular rivet but only required it to be pulled through to the extent that the shank of the tubular rivet was expanded against the sides of the holes in the workpieces as specified in the claim (App. B, p. 32a).

THE WRIT SHOULD BE DENIED.

This is an ordinary patent case in which the patent in suit has been held valid and infringed and, hence, the licensee, petitioner, will be required to pay the royalties it agreed to pay respondent. The contested issues have been fully tried and reversed on appeal and have been decided against petitioner by, with one exception, the concurrent conclusions of the District Court and the Court of Appeals. They are important only to the respective parties and have no bearing or importance to the public or to recognized principles of law.

Petitioner argues that there is a conflict between the decision of the Court of Appeals and the decisions of this Court particularly *Schriber-Schroth Co. v. Cleveland Trust Co.* (1940) 311 U.S. 211 and *Exhibit Supply Co. v. Ace Patents Corp.* (1942) 315 U.S. 126. No such conflict exists. The Court of Appeals clearly recognized and applied the legal principles set forth in those cases. It specifically stated that "abandoned claims may not be revived by being read into the language of allowed claims" citing *Schriber-Schroth* (App. B, p. 30a). The Court of Appeals also discussed *Exhibit Supply Co. v. Ace Patents Corp., supra,* and, pursuant thereto considered the file history "to determine whether there has been an attempt to revive abandoned claims" (App. B, p. 31a). Petitioner's complaint is not with the law applied by the Courts below but with the facts found by those Courts. The Courts below found as a fact that there was no attempt to revive abandoned claims. Hence, the decisions with which petitioner asserts the Court of Appeals' decision is in conflict are not applicable to the facts as found by the Courts below. There is no con-

The Writ Should Be Denied.

flict. What petitioner is really seeking is the chance to convince this Court that there has been an abandonment. It seeks another hearing on the facts decided against it. However, this Court has not and should not exercise certiorari jurisdiction merely to accommodate defeated litigants who are dissatisfied with factual decisions of the lower courts. As stated by Mr. Chief Justice Taft in *Magnum Import Co. v. Coty* (1923) 262 U.S. 159, 163, "The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioner also suggests that the decision of the Courts below is in conflict with the reissue provision of the Patent Code, 35 U.S.C. Sections 251, 252. This assertion was first made in the lower courts in petitioner's petition for rehearing in the Court of Appeals. It is completely without merit. The Courts below did not purport to reissue the patent in suit. The Courts below merely construed the claims of the patent in suit in accordance with the specification and file history and, applying accepted legal principles, found that the Olympic-Lok rivet was an infringement upon those claims when properly construed. Petitioner is merely attempting to get this Court to review basically factual determinations made by the Courts below by asserting, contrary to fact, that the determinations constitute a "judicial reissue." If petitioner's argument were sound every unsuccessful litigant found to be an infringer would be able to contend that the lower courts' determination constituted a "judicial reissue." Such is clearly not the case.

There clearly is no conflict with decisions of this Court and there is no reason to retry the issues of fact.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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